UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

LIBERTY OF INDIANA CORPORATION
Employer

and Case 25-RC-10356

AMERICAN FEDERATON OF STATE,
COUNTY & MUNICIPAL EMPLOYEES
INTERNATIONAL UNION COUNCIL
62 (AFSCME)
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, (herein called the Act) a hearing was held on July 13, 2006, before a hearing officer of the National Labor Relations Board, herein called the Board to determine an appropriate unit for collective bargaining.[1]

I. ISSUES

The Employer, Liberty of Indiana Corporation, asserts that the Board may not have jurisdiction over this matter if the Petitioner, American Federation of State, County & Municipal Employees International Union Council 62 (AFSCME), herein called the Petitioner or the Union, is successful in a law suit that it has pending before the Indiana Court of Appeals. In that suit the Union contends that the privatization of the operations at the Fort Wayne, Indiana State

[1] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Developmental Center, herein the Center, was in violation of State of Indiana, herein the State, statutes. If the lawsuit is found to have merit, the operation of the Center could revert back to the State over which the Board has no jurisdiction. The Petitioner contends that this assertion by the Employer is a delay tactic and that the Board should exercise its jurisdiction over the representation questions before it.

The Employer also contends that the petition for an election among the agreed upon unit of employees should be dismissed because the reduction of the employee complement and cessation of operations at the Center is certain and imminent. The Petitioner contends that the petition should not be dismissed because the Employer's plan for a reduction in workforce and cessation of operations at the Center is not so imminent as to preclude meaningful collective bargaining on the behalf of the unit employees.

II. DECISION

For the reasons discussed in detail below, it is concluded that the Board has jurisdiction over the Employer at this time and any change in employer status can appropriately be dealt with if and when the change occurs. Furthermore, it is concluded that the Employer's request to dismiss the petition because of the asserted imminent reduction in the complement of the unit and the cessation of operations at the Center is denied.

Therefore, the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time account clerks 2 and 3, including payroll specialist and credentialing specialist, administrative assistant, automotive mechanic 2, beautician, clerk records QMA, clothing clerk, cook 3, certified occupational therapist assistant, communication operator 4, dental assistant 4, driver 4, DSP, DSP workshop, electronic technician, food service worker 4, housekeeper 4, tab technician, laborer 3, laundry assistant 4, maintenance carpenter, maintenance electrician, maintenance plumber, maintenance repair person 3, physical therapy assistant, rehabilitation therapists, rehabilitation therapy assistant 3, rehabilitation therapy assistant 4, senior printer, steam plant maintenance mechanic, steam plant operator, store's clerk 4, and store's clerk 5 employed by the Employer at its Fort Wayne, Indiana facility; BUT EXCLUDING all professional employees, all registered nurses, all temporary employees, all confidential employees, all guards and supervisors as defined in the Act, and all other employees.[2]

[2] The parties stipulated at hearing that this was an appropriate unit.

The Unit found appropriate herein consists of approximately five hundred twenty-five (525)[3] employees for whom no history of collective bargaining exists under the National Labor Relations Act.[4]

III. STATEMENT OF FACTS

The Employer operates the State Developmental Center in Fort Wayne, Indiana. The Center provides residential care and treatment for clients that are developmentally delayed. The Center is a residential treatment facility and many of the clients have physical disabilities that accompany their developmental delays; therefore, a wide variety and large number of staff positions are necessary to care for the clients and the facilities at the Center. The Center provides its clients with housing, food services, laundry service, medical and nursing services, therapy, and other services necessary to care for their needs.

Prior to January 1, 2006, the Center was a State run facility operated with State employees who were overseen by the State agency, Family and Social Services Administration, herein called FSSA. The State employed as many as 1200 employees at the Center and had contracts with private entities for additional employees and services. Since about 2001, the Employer had a contract with the FSSA to provide a medical director and licensed practical nurses to work at the Center.

On May 10, 2005, FSSA requested that the Employer expand its role at the Center to provide management and develop a downsizing and closure plan for the Center. The Employer developed committees to study the process by which the Center could be downsized and closed. Although the Employer started taking steps to downsize the Center in May 2005, a public announcement by FSSA that the Center would be closed was not made until October 2005. Following this announcement, on December 12, 2005, FSSA and the Employer entered into a contract providing that the Employer take over operations of the Center and implement its plan for downsizing and closing the Center. On December 31, 2005 at 11:00 P.M., that contract became effective and the State employees who continued working at the Center became employees of the Employer.

On December 13, 2005, the Petitioner filed a Verified Complaint Seeking Emergency Preliminary Injunction and Permanent Injunction in Allen County Superior Court to enjoin the

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[3] The record is unclear as to the exact number of bargaining unit positions at the time of the hearing. The Employer representative testified that approximately 600 employees were employed at the Center at the time of the hearing, but she was unable to identify how many of those employees were in Unit positions. The Petition indicates the Union's belief that there were 525 employees in Unit positions at the time the petition was filed. Therefore, the estimate of the number of Unit employees is based upon Employer's contention that there are less than 600 and the Union's contention that there are 525.

[4] For a period of several years while the employees were employed by the State they were represented by the Union pursuant to a State executive order allowing State employees to organize.

State from continuing the contract with the Employer. The Complaint alleged that the State was required to conduct a bidding process for the contract before awarding it and had failed to do so. The Allen County Superior Court ruled against the Petitioner and the Petitioner has appealed that decision to the Indiana Court of Appeals. As of the date of the hearing, the Indiana Court of Appeals had not rendered a decision.

From the Employer's initial involvement at the facility in May 2005 until December 31, 2005, the staffing levels at the Center had decreased from about 1200 to 900.[5] Upon the Employer's takeover on January 1, 2006, approximately 300 employees chose not to continue working at the Center; therefore, the Employer hired approximately 300 new employees to fill those vacant positions. Between January 1, 2006, and the hearing on July 13, 2006, the employment rolls had dropped to roughly 600 employees. The Employer has not laid off employees. This reduction in staff has occurred due to "natural attrition" (i.e. retirements, discharges, employees quitting). The Employer continues to advertise and hire to fill necessary position openings.

Because the Employer is required to maintain a certain employee to client ratio for each client living at the Center, the number of employees, especially the number of employees holding unit positions, is directly related to the number of clients remaining at the facility. On average, the client-to-staff ratio is 4 or 5 to 1. As the Employer works towards its goal of downsizing and closing the Center by June 30, 2007, the employee complement will decrease as the number of clients remaining at the facility decreases.

The placement of each client into another living situation is a complicated task requiring: a detailed assessment of each client's individual needs, location of an available living situation to meet those needs, and guardian approval for the transfer to take place. The complexities in effectuating the transfer of the clients makes it impossible to definitively determine when clients will leave the Center and correspondingly how many employees will be needed for any given time period.

The Employer has set forth time targets for the transfer of the clients with a target of having all the clients transferred by February 1, 2007. When the Employer started managing the facility in May 2005, the Center housed approximately 219 clients. By April 1, 2006, the Employer was behind its targeted placement of clients, and the FSSA threatened to cancel its contract if the Employer did not increase its pace of placing clients. As of May 1, 2006, the Center still housed 166 clients. Twelve clients were transferred in May, five clients were transferred in June 2006, and two clients were transferred between July 1 and July 13, 2006, leaving 147 clients remaining at the Center. The Employer representative testified that an additional 12 clients should be transferred prior to the end of July, which is two less than what was targeted for July. The Employer's transfer targets for each month between July 2006 and January 2007 vary between 15 and 25 with the exception of 10 transfers targeted for November 2006.

[5] All estimates of the number of employees includes both unit and non-unit employees working at the facility. The record does not indicate the number of unit employees.

Although the Employer claims it has projected employment figures for each unit position for each increment of 25 clients remaining at the Center, it did not provide those projections at the hearing. The Employer representative could not specifically recall the projections for each increment of 25, but testified that when 25 clients remain at the Center approximately 270 employees would still be employed. The Employer submitted target numbers of clients to be transferred each month showing that the last 25 clients are targeted to be transferred in February 2007. Although the Employer representative testified that the percentage of employees would decrease as the percentage of clients decrease, the percentage of decrease does not appear to be at a one-to-one ratio.[6]

The Employer has targeted for all the clients to be transferred by the end of February 2007, in order to provide a buffer for its goal of having all the clients transferred no later than June 30, 2007. The Employer representative noted the complexity in finding an available, appropriate placement for each client and stressed that transferring clients can be delayed by numerous factors, and therefore, the Employer's target goal of the end of February was set to allow for delays in the process. In fact, the Employer's monthly fee for managing the Center will decrease by 20% starting on January 1, 2007. The Employer will continue to receive the reduced fee through December 31, 2007, as long as all clients are transferred by September 30, 2007. If all the clients are not transferred by September 30, 2007, the Employer's fee will be reduced to zero on October 1, 2007, but it will still be required to complete the transfer of the clients and close the facility.

Even after all the clients are transferred, a crew of approximately 40 employees will be necessary to handle the Center's documents, the surplus of equipment, and the operation of the power plant for the facility. This crew will continue working until all the documents are properly destroyed or warehoused as well as until the demolition of some buildings and the transfer of the remaining buildings and property to area educational institutions is accomplished. These final closing tasks are projected to take 45 to 60 days after all clients have been transferred; however, a 90 day period is built into the contract for these processes to occur. The Employer representative was unable to determine with certainty how many of the employees who will remain to complete these closing tasks will be unit employees, but estimated that it would be roughly twenty.

The Employer representative testified that in her past experience with closing institutions such as the Center, there is an ongoing need for a team of employees to monitor and address issues that arise for the clients in their new placements. The record is unclear as to whether a final decision has been made by the FSSA to contract with the Employer or some other employer for such a team of employees. The record does not clarify whether the positions on any such team would include unit positions.

The Employer has entered into evidence a memorandum of understanding with the educational institutions that will be acquiring the Center's property. The Employer representative testified that this was a contract requiring the Employer to transfer property and

[6] The percentage decrease of clients from 147 to 25 is 83%. The percentage decrease in employees form 600 to 270 is 55%.

buildings to these institutions by July 1, 2007. The memorandum of understanding submitted appears to be an ongoing plan and not a contract. The document contains no signatures and no consideration to make it a binding contract for which the Employer would be held accountable for missing the July 1, 2007 date for the transfer of the property.

IV. DISCUSSION

A. Jurisdictional Issue

The Employer contends that the Board should postpone processing of the petition in this case until the Indiana Court of Appeals rules on the Petitioner's lawsuit contesting the validity of the contract between the State and the Employer. Although the Employer admits that it is the current employer of the employees in the Unit and it is covered by the Board's jurisdiction, it contends that if the Petitioner's state lawsuit is successful the employees would revert back to being employed by the State and the Board would no longer have jurisdiction. The tentative possibility that the Petitioner will win its state lawsuit, especially considering it was already denied by the lower court, is not a sufficient reason to postpone processing the petition when there is no contention by any of the parties that the Employer, the current employer of the Unit employees, is outside the Board's jurisdiction.

B. Imminent Closure Issue

Under existing precedent, the Board has determined that there is no useful purpose to direct an election when cessation of operations and the resulting layoff of all the unit employees is imminent and certain. Hughes Aircraft Co., 308 NLRB 82, 83 (1992); Fish Engineering & Constr. Partners, Ltd., 308 NLRB 836, 837-8 (1992) (and cases cited therein); M.B. Kahn Constr. Co., Inc., 210 NLRB 1050, 1050 (1974). E.I. du Pont & Co., 117 NLRB 1048 (1957). The Board has not specifically defined imminence by a particular time period. The Board has, however, made clear that imminence is when closure or permanent layoffs is so near in time that holding an election serves no useful purpose. The cessation of operations within three to four months of the issuance of the decision directing an election has been found to be sufficiently imminent to preclude the direction of the election. *See* Larson Plywood Co., Inc., 223 NLRB 1161 (1976) (decision to direct an election overturned when the company was scheduled to be liquidated and sold within 75 days of the direction of the election); Martin Marietta Aluminum, Inc., 214 NLRB 646 (1974) (decision to direct an election overturned when the plant was scheduled to close within 90 days of the direction of the election); see also M. B. Kahn Construction Co., 210 NLRB 1050 (1974); General Motors Corp., 88 NLRB 119 (1950); Todd-Galveston Dry Docks, 54 NLRB 625 (1944); Fraser-Brace Engineering Co., 38 NLRB 1263 (1942); Fruco Construction Co., 38 NLRB 991 (1942). Other Board decisions have held that the direction of an election where the cessation of operations is not planned to occur for six or more months is appropriate. *See* Norfolk Maintenance Corp., 310 NLRB 527 (1993) (where Board denied review of the decision to direct an election when planned cessation of operations was

seven months from the issuance of the decision); E.I. du Pont & Co., 117 NLRB 1048 (1957) (where election was directed with only six months left until operations were to cease).

In addition to considering the time frame in which operations are scheduled to cease, the Board also considers the contraction of the workforce and whether a substantial portion of the unit will remain employed until closure. *See* Kahn Construction supra at 1050; Martin Marietta Aluminum, supra at 646; Plum Creek Lumber Co., Inc., 214 NLRB 619 (1974). For example, in Plum Creek Lumber, the Board overturned the direction of election because the complement of unit employees performing installation work was scheduled to decrease 82% within two months of the issuance of the direction of election. The remainder of the employees would continue working indefinitely performing service versus installation work. The Board found that it was inappropriate for an election to be held in the petitioned-for unit because the complement of that unit would be so dramatically changed within two months of the direction of election. Id. at 619. Similarly, in Kahn Construction the two units at issue were scheduled to contract 77% and 52% within 2 ½ months after the direction of election and the operations were scheduled to cease four months after the direction of election. *Supra* at 1050. The Board also noted that the unit in Martin Marietta Aluminum would contract 50% by the scheduled election date but that all operations would cease within 3 ½ months after the direction of election issued.

In this case, the ultimate closure of the Center is certain, but the date of closure is not sufficiently imminent as to render an election for a bargaining representative for the Unit to be useless. Even if the Employer meets its target of transferring all the clients from the Center by the end of February 2007, nearly half (270)[7] of the 600 current employees will continue to work at the facility in February 2007. The Employer admits that the transfer of each client is a complicated process that can be held up by numerous factors not being met and that such delays have already occurred. With knowledge of these complications, the announced date of the closure of the Center is June 2007. Indeed the Employer has protected itself from financial liability by the terms of its contract with FSSA unless all the clients are not transferred by the later date of September 2007.

Therefore, it is reasonable to determine that 50% or more of the current Unit positions will likely exist for at least seven months after the date of this decision and likely longer. Because 270 employees are projected to be needed when there are only 25 clients remaining at the Center, a significant portion of the unit could continue to be employed well past the Employer's target date of February 2007. Indeed, it is possible that a significant portion of the Unit could be employed until June or even September 2007, eleven to fourteen months after the direction of election in this case. In addition, a complement of approximately 20 Unit employees will continue to work at the center for as much as an additional three months after all the clients are transferred. Because a significant complement of Unit employees is likely to continue to be employed at the Center for more than six months, this case is controlled by the Board's decisions in E.I. du Pont and Norfolk Maintenance, where the Board found that scheduled closure in six

[7] Again, the record is unclear as to how many or what percentage of these total numbers of employees at the Center are Unit employees, but it is assumed that the percentage of unit to non-unit employees would remain nearly the same.

and seven months was not sufficiently imminent to render an election useless. E.I. du Pont at 1051-52; Norfolk Maintenance at 528.

In its argument that the cessation of its operations at the Center is sufficiently imminent to preclude an election, the Employer relies heavily upon the Board's decisions in Kahn Construction and Martin Marietta. The Employer notes the Board's attention to the contraction of the units in those cases and contends that the Unit in this case is contracting in a similar fashion. The facts of those cases are distinguisable from the case at hand because the timeline for the contraction of the unit and cessation of operations was less than four months from the direction of election. The Employer contends that its plan to downsize its employment rolls as clients are transferred is similar to the downsizing that occurred in Kahn Construction. Although the Board considered the planned contraction of the unit complement as evidence of the impending cessation of operations in those cases, the Board did not overturn the direction of elections in those cases due to the planned unit contraction alone. In Kahn Construction, the reduction of workforce coupled with the four-month period from the time the election was directed and the planned closing of operations was the basis for the Board's decision to overturn the direction of election. Supra at 1050. Similarly, in Martin Marietta, the layoff schedule coupled with the planned closure of the facility within less than 3 1/2 months of the direction of election was the basis for overturning that direction of election. Indeed, all the cases cited by the Employer involve facilities scheduled for closure within four months or less of the direction of election. Furthermore, none of these cases noted the possibility of significant delays in the employers' projected dates of contraction of the unit and closure as are presnt in this case.

Another distinction between Kahn Construction and the case at hand is that the employer in Kahn Construction set forth a schedule that specifically outlined the number of employees that would be laid off on specific dates. The Employer in this case was unable to give specifics about exactly when the reduction of force would take place because it is so dependent upon when clients are transferred as is discussed above. Furthermore, the Employer had a projected employment census based upon each interval of 25 employees remaining at the facility, but did not introduce this information into evidence.[8] The Board has directed elections when there has been insufficient evidence about when and how many employees would be laid off in preparation for the cessation of operations. *See* General Electric Co., 101 NLRB 1341, 1344 (1952). In General Electric, the Board acknowledged that layoffs would occur as the operations wound down, but the Employer failed to show how many of the employees would be laid off and on what dates. Based upon the evidence in the record, the Board concluded that a substantial and representative complement would remain employed for the majority of the closing period and upheld the direction of an election. Id. at 1344.

It is unclear when the layoffs will occur in this case, but even given the Employer's contention that only 270 employees will be needed in February 2007, there will be 45% of the current workforce still employed more than six months from the date of this decision. Considering the Board's decisions in E.I. du Pont and Norfolk Maintenance to conduct an election when the scheduled shut down would not occur for more than six months from the

[8] The Employer contends that if such information was available to its employees, it would cause an increase in the attrition rate beyond what is required at this time.

direction of election and the Board's decision in General Electric that absent specific evidence concerning the planned schedule of layoffs, it is appropriate to find in this case that a substantial complement of employees will remain employed for a sufficient amount of time for meaningful bargaining to take place. Therefore, the direction of an election in this case is appropriate.

Based upon the above discussion, the Employer's request that the petition be dismissed because of the asserted imminent reduction of workforce and cessation of operations at the Center is denied and an election involving the Unit will be conducted as described below.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by American Federation of State, County & Municipal Employees International Union Council 62 (AFSCME).

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before August 11, 2006. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by August 18, 2006.

SIGNED at Indianapolis, Indiana, this 4th day of August 2006.

/s/ Patricia K. Nachand
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